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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, APPELLANT,
v.
WILLIAM T. SAMPSON, REAR-ADMIRAL, United States Navy, etc.
} No. 273.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

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STATEMENT OF THE CASE.

This appeal was taken from a decree of the Supreme Court of the District of Columbia, sitting as a district court of the United States, in admiralty, in a suit in prize brought by William T. Sampson, rear-admiral, United States Navy, in behalf of himself and the officers and men of the naval force on the North Atlantic Station, who took part in the battle off Santiago.

On July 3, 1898, the late Rear-Admiral William T. Sampson, United States Navy, with the fleet under his command, engaged a Spanish fleet consisting of the armored cruisers *Infanta Maria Teresa*, *Cristobal Colon*, *Vizcaya*, and *Almirante Oquendo*, and the torpedo boats *Furor* and *Pluton*, near Santiago de Cuba.

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None of the Spanish vessels was afloat at the close of the action, but as all the armored cruisers had sunk in comparatively shallow water, considerable portions of them remained above the surface. The least injured of all was the *Cristobal Colon*, which was sunk by the Spaniards after it had surrendered, but it lay nearly on its beam ends. The vessel in the next best condition was the *Infanta Maria Teresa*, whose bottom had been pierced by a point of rock, while she was completely burnt out above the protective deck, even the metal work being so thoroughly ruined that complete reconstruction above the protective deck would have been required to make the vessel serviceable. She lay about upright, however, being submerged to about her normal load water line aft and a little less than this forward. (Appx.,[a] 500–511, 573–592; Rec., 84, 150.

On July 5, 1898, Capt. F. E. Chadwick, commanding the flagship *New York*, and in behalf of the officers and men on board, made an application to the Navy Department for the statutory reward for the "destruction of the Spanish fleet," mentioning the *Teresa* along with the other vessels. Similar applications, referring to the "destruction" of the *Teresa*, were subsequently made by the officers in command of the *Brooklyn*, *Texas*, *Indiana*, *Iowa*, *Hist*, *Ericsson*, *Vixen*, and *Suwanee*. Captain Chadwick and other officers testified that they had never doubted that the *Teresa* would be raised. (Rec. 36, 45, 113, 117, 129, 140, 150, 167–173.)

[a] For brevity, the appendix to the report of the Chief of the Bureau of Navigation for 1898, which is by agreement a part of the record in this case, will be referred to in this brief as "Appx."

On July 6, 1898, the Merrick & Chapman Derrick and Wrecking Company contracted with the United States "for raising Spanish war vessels now ashore on the southern coast of Cuba, near Santiago." This contract stated that the United States desired to raise and save as many as possible of the Spanish vessels, and provided that the contractors "upon arrival at the scene of the wreck of the *Cristobal Colon* should at once begin the work of raising that vessel." (Rec., 15.)

On July 6, 1898, a board of eight officers was appointed to make "a thorough examination of the condition of the wrecked Spanish vessels," the orders stating that the possibility of saving any of the vessels was to be considered and reported upon. On July 13, 1898, the board reported that it was "possible and desirable to float the *Infanta Maria Teresa*," and that "if the weather continues favorable the possibilities are good for saving" the *Cristobal Colon*. (Appx., 573–592.)

Soon after this the contractors began work on the *Colon*, and on July 29, 1898, a supplementary contract was made in regard to the work on that vessel. (Rec., 164.)

The protocol of August 12, 1898, provided that "Spain will relinquish all claim of sovereignty over and title to Cuba," and that "upon the conclusion and signing of this protocol, hostilities between the two countries shall be suspended." (30 Stats., 1742.)

Wrecking operations were carried on for some time for the purpose of raising and floating both the *Colon*

and the *Teresa*, but the work on the *Colon* was stopped on or about August 31, 1898, in spite of the protests of Constructor Hobson, and the force was concentrated on the *Teresa*, which was finally floated on September 23, and reached Guantanamo on September 24. She then received certain temporary repairs, and on October 29, 1898, started for Norfolk, Va., in tow of the United States repair ship *Vulcan* and the wrecking tug *Merritt*, and also using her own steam as far as the condition of her engines permitted. On November 1 she encountered a very severe storm, and after some hours, being apparently in a sinking condition, she was cast off, and disappeared in the darkness. She ultimately drifted to Cat Island, where she struck the rocks and became a hopeless wreck. (Appx., 595–602; Rec., 3–31.)

A certain quantity of money and some guns and other property were recovered from the *Teresa*, *Vizcaya*, *Oquendo*, and *Colon*, and were appropriated to the use of the United States.

On July 13, 1899, the Board of Inspection and Survey was directed to appraise the value of the *Teresa* at the time she was raised, and also the value of all the property recovered from her and from the other vessels. On October 10, 1899, the board reported the value of the *Teresa* when raised as $652,497, and the value of the property recovered as $29,367; but this latter amount included $6,200.85 for property to which this libel does not relate. The board's appraisal of the property recovered to which this libel relates was

$23,166.15, but this did not include all the money that had been recovered. The Bureau of Supplies and Accounts estimated the cost of the work done in raising and temporarily repairing the *Teresa* at $188,673.90. (Rec., 1–3, 109.)

On July 17, 1899, the appellee filed a petition in the Court of Claims for bounty under section 4635, Revised Statutes, for the destruction of the *Vizcaya*, *Oquendo*, *Colon*, *Furor*, and *Pluton*, and on June 11, 1900, the Court of Claims found that those vessels had been sunk or otherwise destroyed within the meaning of that statute. (*Sampson* v. *United States*, 35 C. Cls R., 578.)

On July 31, 1899, the libel was filed in the present case, setting up that both the *Teresa* and all property taken upon her, and also that taken from the *Colon* and other sunken vessels, were prize of war and had been appropriated to the use of the United States. Copies of the libel were served on the United States attorney for the District of Columbia and on the Secretary of the Navy, and a rule was issued upon the latter requiring him to show cause why the value of the alleged prize property should not be deposited subject to the order of the court, and why the said property should not be condemned as prize. (Rec., V–VII.) Appearance was subsequently entered in behalf of the United States, and an answer filed denying that the *Teresa* and the other property were subject to condemnation in prize. The Secretary of the Navy also filed an answer concurring in the answer of the United States. (Rec., I, XIII, XV.)

The case having been heard, a decree of condemnation was filed July 30, 1901, to the effect that the *Infanta Maria Teresa* and all the property taken from her and from the other vessels were lawful prize of war, that upon the ascertainment of their value the Secretary of the Navy should deposit the amount with the Treasurer of the United States, subject to the further order of the court, and that the libellant and his officers and men were entitled to receive a moiety of such amount. Whereupon the United States took this appeal. (Rec., 177–198.)

ASSIGNMENTS OF ERROR.

The Supreme Court of the District of Columbia erred:

1. In holding that the Spanish vessel of war *Infanta Maria Teresa*, together with her guns, munitions of war, equipment, stores, money, and other articles, was captured by a fleet of the United States under the command of the libellant under such circumstances that the said vessel and other property should be condemned and forfeited to the United States as lawful prize of war for the benefit of the captors.

2. In holding that certain guns, munitions of war, equipment, stores, money, and other articles on board the Spanish vessels of war *Vizcaya*, *Almirante Oquendo*, *Cristobal Colon*, *Pluton*, and *Furor* were captured by a fleet of the United States under the command of the libellant under such circumstances that the said property should be condemned and forfeited to the United States as lawful prize of war for the benefit of the captors.

3. In holding that the libellant and the officers and enlisted men of the United States Navy who took part in the naval engagement off Santiago de Cuba, and in behalf of whom he brought this suit, are entitled to receive a moiety of the amount of the value of the said *Infanta Maria Teresa*, and of the said guns, munitions of war, equipment, stores, money, and other articles.

4. In not holding that the libel should be dismissed.

BRIEF OF ARGUMENT.

The two principal legal questions involved in this case (viz, first, whether an enemy's vessel of war which has been sunk in action and is not at the close of the engagement in a condition either to serve as a vessel of war or to be sent to a prize court for adjudication, but is afterwards raised and floated by outside parties, acting under a contract with the United States, by means of elaborate wrecking operations, is a prize of war; and secondly, whether property taken from enemy's vessels of war which are admittedly "sunk or otherwise destroyed," within the meaning of section 4635 of the Revised Statutes, is prize property) are also involved in the case of *The United States* v. *Dewey*, No. 309. As the cross appeal of Admiral Dewey (No. 310) involved two other legal questions, and as there were certain fundamental principles which underlay all the questions alike, a complete discussion of the law upon all these points has been given in the brief for the United States in cases Nos. 309 and 310, this arrangement being believed to be for the greater convenience of the court.

1.

THE STATUS OF A VESSEL OF WAR "SUNK OR DESTROYED" IN ACTION AND AFTERWARDS RAISED AND PARTIALLY REPAIRED.

The fundamental principles which underlie both the questions in this case are fully discussed in the brief for the United States in *United States* v. *Dewey*, on pages 8 to 25, and a general discussion of the law in regard to vessels "sunk or otherwise destroyed" is to be found in the same brief, on pages 25 to 54 and 77 to 85. As it is not desired to weary the court with a repetition of those arguments, they will be omitted from this brief, which will be confined to the application of them to the present case. It is true that the argument in the brief in the *Dewey case* is made with reference to vessels which, after being raised, had to undergo "reconstruction," whereas the *Teresa* was merely temporarily repaired at Guantanamo; but it is clear from the evidence that in order to fit her for use as a vessel of war, the use for which she was originally built, she would have required reconstruction to about the same extent, proportionately, as did the vessels which were raised at Manila. The appellee's witness, Hobson, testified that "the conditions were closely similar" in this respect as to all these vessels. (Rec., 154.) The mere fact that the *Teresa* was lost before the necessary reconstruction could begin can not, therefore, distinguish her case, in its legal aspect, from that of the vessels raised at Manila.

It is also true that the argument in the brief in the *Dewey case* is made with reference to the fact that the work of raising the vessels at Manila did not begin until over two months after Spain had, by the protocol of August 12, 1898, relinquished to the United States the right to "occupy and hold" the bay of Manila, whereas the work on the *Teresa* began while the war was still going on. As, however, the libel in the present case was filed on the theory that the *Teresa* was raised and floated, and as this was not done until more than a month after Spain had relinquished "all claim of sovereignty over and title to" the spot where the *Teresa* lay, the mere fact that the contractors did some work upon her before hostilities ceased can not affect the case.

In the naval battle of July 3, 1898, off Santiago, all of the Spanish vessels engaged, viz, the *Infanta Maria Teresa*, *Cristobal Colon*, *Almirante Oquendo*, *Vizcaya*, *Pluton*, and *Furor*, were, it is submitted, "sunk or otherwise destroyed" within the meaning of section 4635 of the Revised Statutes, and the appellee and the naval force under his command were then entitled to bounty under that section on account of all of these vessels. If the *Teresa* had her full complement of men on board (484 men, Rec., 176), this bounty would amount to $48,400 for that one vessel. That all of these vessels except the *Infanta Maria Teresa* were "sunk or otherwise destroyed" was decided by the Court of Claims in *Sampson* v. *United States* (35 C. Cls. R., 578); but that court made no decision as to

the status of the *Infanta Maria Teresa*, and expunged as irrelevant the finding that had been made at the claimant's request in regard to that vessel. Even had the Court of Claims not done so, nothing decided in that case could be *res judicata* in this, because while the parties are the same in both cases the issues are not. There the issue concerned the rights of the claimants as regards certain vessels, while here the issue concerns the rights of the appellee and his officers and men as to another vessel—a totally different issue. It is well settled that identity of issues is essential to the operation of the doctrine of *res judicata*.

In this connection, to prevent any misunderstanding, it is necessary to call attention to certain statements, made as statements of fact, in the brief of the Messrs. King for certain captors. That brief states that the *Vizcaya*, *Oquendo*, and *Colon* were "completely destroyed," and that, on the other hand, the *Teresa* had "run ashore and grounded." In so far as these statements tend to make a distinction between the situation and condition of the *Teresa* on the one hand, and of the three other cruisers on the other, it is submitted that they are very inaccurate and misleading The *Colon* was sufficiently sunk to enable the appellee to recover bounty under section 4635, and the *Vizcaya* and *Oquendo* were sufficiently destroyed to warrant a similar recovery as regards them; but the *Colon* was structurally in far better condition than the *Teresa*, and by the undisputed testimony of two of the appellee's witnesses (Rec., 145, 162) could have been raised if

the Navy Department had seen fit to have it done, while it needs but a glance at the illustrations in the report upon the condition of these vessels (Appx., 572) to see that while the *Vizcaya* and the *Oquendo* were undoubtedly in worse shape than the *Teresa*, the words "run ashore and grounded" were as true of them as of the latter vessel.

Another statement in the same brief (p. 5) is that the *Teresa*, "while still beached, was taken for, and appropriated to the use of, the United States." Similarly, the brief for the appellee (p. 10) refers to the *Teresa* as "appropriated" on July 6, 1898. It is submitted that as regards the time of the appropriation these statements are wholly incorrect. As will be shown below, there could not possibly have been any such appropriation until the vessel was raised; but, without anticipating that argument, it is necessary to traverse at the outset the statement that the *Teresa* was appropriated at any time before she was floated. It is true that the *Teresa* came under the control of the United States at the close of the battle, in the sense that its fleet controlled the waters where the *Teresa* lay on the bottom, but this was equally true of the other Spanish cruisers, which were quite as much under its control as was the *Teresa*, and not more useless to the appellee. Neither he nor the whole fleet which he commanded could have moved the *Teresa* one inch, any more than they could have moved the other vessels.

The acts and declarations of the alleged captors.

At the close of the battle off Santiago the *Teresa* lay on the bottom and was incapable of floating. She lay in shallow water, it is true, but had a good-sized hole in her bottom, and was full of water. She had taken fire during the action, so that practically all her woodwork out of water was destroyed and nearly all the metal work ruined by fire. The fire had not reached her magazine, coal bunkers, or machinery, but only because they were under the water. She had not, like the vessels at Manila, been set on fire after her abandonment by the Spaniards, but the injury by fire was proportionately the same, while the injury due to her sinking was more serious. Moreover, on account of the *Teresa's* great size, the task of raising her was even more completely beyond the power of a naval force unaided by outside parties than was the task of raising the three vessels which were raised at Manila. In short, the status of the *Teresa*, as a vessel "sunk or otherwise destroyed," within the meaning of section 4635 (Rev. Stats.), was as complete as that of the other Spanish vessels which had fought on July 3. If any of them were regarded as possibly not within the category of being "sunk or otherwise destroyed," it was the *Cristobal Colon* only. These facts were recognized in the official dispatches and reports as follows;

> To-day the Spanish squadron, seven in all, including one gunboat, came out of Santiago in column, and was totally destroyed within an hour, excepting *Cristobal Colon*, which was

chased 45 miles to westward * * * but was beached to prevent sinking. (Watson's dispatch, July 3, 1898, Appx. 505.)

I have the honor to make the following report upon the battle with and the destruction of the Spanish squadron commanded by Admiral Cervera, off Santiago de Cuba, on Sunday, July 3, 1898. (Sampson's report, July 15, 1898, Appx. 506.)

The brief examination made yesterday of the *Infanta Maria Teresa* and *Oquendo* has made it apparent that a thorough examination of the condition of the wrecked Spanish vessels, of the effect upon them of gun fire, of combustible materials and explosives, should be made and fully reported upon. You are therefore appointed a board for this purpose, and will immediately proceed to make this examination of the three vessels of war beached and burned, and also of the sunken vessel, the *Cristobal Colon*, which lies at Rio Tourquino, 48 miles west of Santiago. The principal interest in the examination of the *Cristobal Colon* will be to form an opinion as to the feasibility of raising and saving her. The possibility of saving any of the other ships will also be considered and reported upon. It is thought that the *Maria Teresa* is probably uninjured below the water line, and may be floated and repaired. (Sampson's orders of July 6, 1898, Appx. 573.)

The board appointed by the orders just quoted was officially known as "The board on condition of Spanish vessels sunk or destroyed." It examined all ves-

sels and reported on their condition. Its conclusions were stated as follows:

> The board is therefore of opinion that it is possible and desirable to float the *Infanta Maria Teresa.* * * *
>
> The board finds, for the above reason, that it is impracticable to wreck the *Almirante Oquendo.* * * *
>
> The board is therefore of the opinion that it is inadvisable to save the *Vizcaya.* * * *
>
> Taking full account of the conditions of flotation and of the probable condition of structural solidity, it is considered advisable that an effort should be made to raise and save the vessel [*Cristobal Colon*]. * * *
>
> It is therefore impracticable to wreck the *Pluton.* * * *
>
> The considerable depth of water, which is not accurately known, probably precludes the possibility of wrecking her [the *Furor*].
>
> The board recommends that as soon as possible the *Cristobal Colon* should be secured by cables and anchors, so that she can not be moved from her present position. The board recommends that the wrecking companies be directed to arrive at the earliest moment with all facilities possible to wreck the *Cristobal Colon*, and is of the opinion that if the weather continues favorable the possibilities are good for saving the vessel. * * *
>
> The ships *Infanta Maria Teresa*, *Almirante Oquendo*, and *Vizcaya* were destroyed by conflagration, caused by the explosion of shells in the interior and setting fire to woodwork. The

upper decks and all other woodwork are entirely consumed, except at the extremities. (Appx., 574 to 591.)

The language used in these official reports is instructive, as it indicates the meaning attached by naval officers to the word "destroyed." It is evident that the *Infanta Maria Teresa* was regarded as having been destroyed according to the meaning attached to that term by naval officers, although at the same time the same officers referred to the probabilities of raising and saving the vessel, as well as the *Cristobal Colon*, which they usually referred to as having been "sunk." Both the words "sunk" and "destroyed," as used by these officers, refer to conditions not necessarily inconsistent with a vessel being ultimately raised, floated, and repaired.

Moreover, nearly every one of the original applications for bounty, on account of the destruction of the Spanish war vessels off Santiago, speaks of the *Infanta Maria Teresa* as having been destroyed, and not one such application excludes the *Teresa* or suggests that she was a prize. It is true that some of these reports speak of "prize money," instead of "bounty," as due on account of the destruction of these vessels, but as it has been judicially declared that bounty is given "in lieu of" prize money (*Porter* v. *United States*, 106 U. S., 607; see also *The Selma*, 1 Low, 30), the latter expression is scarcely a misnomer, and the important point is that the claims are all the same as regards the *Teresa* as in regard to the vessels which have been judicially held to have been destroyed.

The application of Capt. F. E. Chadwick, of the *New York*, dated July 5, 1898, is as follows:

> List of officers and men attached to and serving on board the U. S. flagship *New York*, showing their exact rank or rating held at the time of the sortie and destruction of the Spanish fleet the *Infanta Maria Teresa*, *Vizcaya*, *Almirante Oquendo*, *Cristobal Colon*, and torpedo boats *Furor* and *Pluton*, under Admiral Cervera, near Santiago de Cuba, July 3, 1898. (Rec., 167.)

A later application of the same officer, dated August 19, 1898, is as follows:

> I have the honor to forward herewith a list of officers and men attached to and serving on board the U. S. flagship *New York*, entitled to share in the prize money accruing from the destruction of the Spanish vessels July 3, the *Infanta Maria Teresa*, *Almirante Oquendo*, *Vizcaya*, *Cristobal Colon*, and the torpedo-boat destroyers *Pluton* and *Furor*. (Rec., 173.)

The application of Capt. F. A. Cook, of the *Brooklyn*, dated July 26, 1898, is as follows:

> List of officers, crew, and marines on board the U. S. flagship *Brooklyn* who assisted in the destruction of the following Spanish vessels: *Infanta Maria Teresa*, *Vizcaya*, *Almirante Oquendo*, *Cristobal Colon*, *Pluton*, and *Furor*, July 3, 1898, Santiago de Cuba, Cuba. (Rec., 167.)

The application of Capt. J. W. Philip, of the *Texas*, is as follows:

> Prize list of the U. S. battleship *Texas*, July 3 and 4, 1898, on which dates the following-

named Spanish ships were destroyed, viz: *Almirante Oquendo*, *Infanta Maria Teresa*, *Vizcaya*, *Cristobal Colon*, *Pluton*, *Furor*, *Reina Mercedes*. (Rec., 169.)

The application of Capt. H. C. Taylor, of the *Indiana*, dated July 25, 1898, is as follows:

> List of officers, crew, and marines on board the U. S. battleship *Indiana* at the time of the action of July 3, 1898, off Santiago de Cuba, resulting in the destruction of the Spanish squadron composed of the *Infanta Maria Teresa*, *Almirante Oquendo*, *Vizcaya*, *Cristobal Colon*, *Pluton*, and *Furor*. (Rec., 168.)

A later application of the same officer, dated January 26, 1899, is as follows:

> SIR: I have the honor to make claim for myself, as the commanding officer of the United States battle ship *Indiana*, for her officers and crew, to share in the prize or bounty money awarded or to be awarded for the destruction of the Spanish ships during the war between the United States and Spain.
>
> The names of the vessels under which we claim such share of bounty or prize money are:
>
> *Infanta Maria Teresa*, at Santiago de Cuba, July 3, 1898; *Vizcaya*, at Santiago de Cuba, July 3, 1898; *Oquendo*, at Santiago de Cuba, July 3, 1898; *Cristobal Colon*, at Santiago de Cuba, July 3, 1898; *Furor*, at Santiago de Cuba, July 3, 1898; *Pluton*, at Santiago de Cuba, July 3, 1898; *Reina Mercedes*, at Santiago de Cuba, July 4, 1898. (Rec., 168.)

The application of Capt. R. D. Evans, of the *Iowa*, dated August 13, 1898, is as follows:

> I forward herewith a list of officers and men of this vessel who took part in the engagement with the Spanish squadron off Santiago de Cuba, on July 3, 1898, and who were present at the time of the destruction of the Spanish vessels *Infanta Maria Teresa*, *Almirante Oquendo*, and *Vizcaya;* also the torpedo-boat destroyers *Furor* and *Pluton*. (Rec., 169.)

The application of Lieut. Lucien Young, of the *Hist*, dated July 25, 1898, was as follows:

> SIR: On behalf of the officers and crew of this vessel I hereby make claim for a proportionate share of any bounty that may be awarded for the destruction of the Spanish fleet off Santiago, Cuba, July 3, 1898.
>
> * * * * *
>
> The vessels destroyed were the *Maria Teresa*, *Vizcaya*, *Cristobal Colon*, *Oquendo* (armored cruisers), and *Pluton* and *Furor* (torpedo-boat destroyers). (Rec., 170.)

The application of Lieut. N. R. Usher, of the *Ericsson*, dated July 19, 1898, was as follows:

> List of officers and crew of the U. S. torpedo boat *Ericsson* present and serving on board and participating in the action which resulted in the complete destruction of the Spanish fleet off Santiago de Cuba, July 3, 1898. (Rec., 171.)

The application of Lieut. A. Sharp, jr., of the *Vixen*, dated July 7, 1898, was as follows:

> I have the honor to submit a complete list of the officers and men of the U. S. S. *Vixen* enti-

> tled to share in the award of prize money due from the destruction of the Spanish fleet under the command of Admiral Cervera, on July 3, 1898. (Rec., 172.)

The application of Lieut. Commander D. Delehanty, of the *Suwanee*, dated August 3, 1898, is as follows:

> SIR: Herewith is a prize list of the officers and crew of this vessel, for a share in prize money for the Spanish ships *Maria Teresa*, *Vizcaya*, *Cristobal Colon*, *Almirante*, *Oquendo*, *Pluton*, and *Furor*, sunk or destroyed on July 3, and for the Spanish cruiser *Reina Mercedes*, sunk on July 5, 1898. (Rec., 172.)

It is submitted that all these officers are so many witnesses, and there can be none better, to the fact that in the United States Navy the word "destruction," as applied to an enemy's vessel of war, especially in connection with section 4635, Revised Statutes, does not mean total or irremediable destruction, but such destruction as renders the vessel incapable either of serving as a part of the enemy's fighting force or of being floated at all by any means available to the naval force which has come into the control of such vessel. Captain Chadwick has testified: "I always regarded her [the *Teresa*] as a ship certainly to be saved. I never had any doubt about that; not the least." (Rec., 36.) And yet, on July 5, 1898, and as late as August 19, he referred to her officially as destroyed, and considered himself entitled to bounty on account of such destruction. Similarly, Captain Taylor testified; "I knew that she could be easily saved and floated; about

that there could be no question. She was perfectly easily saved. I entertained no doubt whatever at any time of this." (Rec., 113.) Yet he, too, both on July 25, 1898, and on January 26, 1899, referred officially to her "destruction," and presented a claim for bounty on that account. The other officers must certainly also have realized when they presented their claims for the destruction of the *Teresa* that the Navy Department would soon have her raised. There was no inconsistency whatever in their then position, which, as far as appears, they maintained until July 15, 1899, when the libellant's counsel made affidavit to a petition in a suit for bounty in the Court of Claims, in which petition it was first stated that the *Teresa* was subject to condemnation in prize. The inconsistency is rather in their now attempting to give a new meaning to the word "destroyed"—the meaning of total and irremediable destruction, which no one had ever thought of before.

In this connection it may be noted that even after the *Teresa* had been floated she was still officially described as a "wreck." The log of the *Vulcan* for September 23, 1898, when convoying the *Teresa* to Guantanamo, states:

> Flagship signaled "Follow the wreck and anchor near her for the night." Came to anchor in the entrance of Guantanamo Bay at 7.05 p. m. Raised anchor and got underway again at 7.20, following the movements of the wreck. (Rec., 4.)

In the brief for the United States in *United States* v. *Dewey*, No. 309 (pp. 57–60), it was pointed out that while a detailed inventory and appraisement was made, by Admiral Dewey's orders, of property which was declared to have been captured at the battle of Manila Bay, and appropriated to the use of the United States, such appraisement being required by section 4624, Revised Statutes, in all cases of appropriation of prize property, yet no such appraisement was made of the *Don Juan de Austria* and the two other vessels which had been sunk and burnt, but afterwards raised and reconstructed. Similarly, in the present case, the libellant failed to require any appraisement of the *Teresa* under section 4624 to be made, as he should have done if the vessel was to be appropriated as prize property.

The acts and declarations of the alleged captors on the one hand and of the United States on the other, in so far as those acts and declarations bear upon the question of whether the *Teresa* was a prize or not, may therefore be summarized as follows:

(*a*) The appellee and one of his immediate subordinates in command each officially reported the *Teresa* as destroyed.

(*b*) Nine of the officers in command of vessels of the appellee's fleet applied, in behalf of the officers and men of their respective vessels, for the statutory reward for the destruction of the *Teresa*, such applications being made from time to time within two months after the battle, and in one instance more than six months after it.

(*c*) None of the alleged captors asserted any rights in the *Teresa* as captors until about July 15, 1899, more than a year after the battle, when the appellee's counsel made affidavit to a petition in the Court of Claims, wherein it was averred that the *Teresa* was taken as a prize.

(*d*) After the close of the battle none of the alleged captors ever, at any time, did anything themselves, as captors, to the *Teresa* to make it possible to hold her as a prize.

(*e*) The alleged captors did not comply with the requirements of section 4615 in regard to the duties of captors of prizes "not in condition to be sent in for adjudication."

(*f*) The Government did nothing to the *Teresa* which it did not have a perfect right to do, without liability to account for its value if, as a matter of fact, it was not a prize.

As far as all these acts and declarations go, they are clearly consistent only with the theory that the *Teresa* was "sunk or otherwise destroyed," and not a prize.

When the words "sunk or otherwise destroyed" were adopted by Congress in providing for naval bounty, they were presumably understood as having a recognized meaning among seafaring men—the same meaning which the officers evidently attached to them in the reports and applications for bounty above quoted. An enemy's vessel of war was regarded as "sunk or otherwise destroyed" when she was rendered incapable of serving as a vessel of war without extensive recon-

struction, and when, in addition, she could not be made to float without a resort to wrecking operations beyond the power of the naval force on the spot to carry on.

A vessel may be "sunk or otherwise destroyed" although capable of being raised.

It has been judicially determined that the *Cristobal Colon* was "sunk or otherwise destroyed" within the meaning of section 4635, and a judgment has been entered in favor of this appellee and his officers and crew for bounty on account of the destruction of that and other vessels (*Sampson* v. *United States*, 35 C. Cls. R., 578); and yet the board on condition of Spanish vessels sunk or destroyed appears to have regarded the *Colon* as at least as practicable of being raised as was the *Teresa*. It expressly stated that the *Colon* had received no structural injury; that none of her boilers had exploded; and that it was advisable to raise and save her. The testimony of the appellee's own witnesses in the present case is positive and uncontradicted to the effect that the *Colon* could have been raised and saved, and that while the cost of raising and floating the vessel might have been greater than in the case of the *Teresa*, the value of the *Colon* when raised would have been very much greater than that of the *Teresa*.

Lieutenant Capehart testified as follows:

> 22. Cross-question. You have stated that your opinion and the opinion of the board was that the *Teresa* was capable of being raised and saved. Both you and the entire board had the

same opinion in regard to the *Colon*, had you not?

Answer. I do not recollect exactly whether the entire board was of that opinion or not. I know the majority of the board were of the opinion that the *Colon* could have been saved, and I personally never have changed my opinion that she could have been saved. I visited her almost a year after she was wrecked, and she seemed at that time to be perfectly strong to withstand the stress that might be put upon her in raising her. (Rec., 145.)

Naval Constructor Hobson testified as follows:

26. Cross-question. This board of which you were a member, which reported upon these various Spanish vessels, considered that the *Colon* also was a salvable ship, did it not?

Answer. It so reported.

27. Cross-question. That was your opinion, was it not?

Answer. Yes; it so reported, and it was my opinion.

28. Cross-question. It is still your opinion, is it not, that with proper measures the *Colon* might have been floated?

Answer. Yes.

29. Cross-question. About how much do you consider it would have cost to float the *Colon* by proper measures?

Mr. HAYDEN. I object to that as immaterial and irrelevant.

Answer. I estimate that if the first method were successful it would take less than $150,000; if she had to be tried again it would

have taken probably $250,000, and that she could absolutely have been gotten off, bottom up, for less than $400,000 and then turned right side up for $50,000 additional; that it would have been a practical certainty for less than half a million dollars.

30. Cross-question. The *Colon* would have required very much less repair than the *Teresa*, would she not?

Answer. Very much less.

31. Cross-question. So that if the *Colon* had been raised in accordance with your opinion and put in order, her net value, deducting all expenses, would have been much greater than the net value of the *Teresa*, would it not?

Answer. I should say almost double. (Rec., 162.)

The contract made by the Secretary of the Navy with the Merritt & Chapman Derrick and Wrecking Company on July 6, 1898, was made primarily with reference to the *Cristobal Colon*. This contract provides that the company shall at once proceed to Santiago with its wrecking steamer *I. J. Merritt*, with crew and provisions, steam pump, boilers, equipments, fittings, cables, surfboats, steam hoisters, etc., "and, upon arrival at the scene of the wreck of the *Cristobal Colon*, at once begin the work of raising that vessel, with so much of her armament, stores, guns, material, equipments, fittings, appurtenances, and other articles as may be possible to recover, and will prosecute the work with dispatch, carefully, and in a business-like manner, and by all means possible." The same contract stated that

as it was "believed that the *Cristobal Colon* is the least damaged of all Spanish vessels above referred to," the contractor should endeavor first to float her. (Rec., 15.) On July 19, 1898, a supplementary contract was made with the wrecking company in regard to this same vessel, providing that the wrecking steamer *Senior* should at once be sent to Santiago with similar equipment to that required by the first contract, and upon arrival upon the scene of the wreck of the *Cristobal Colon* should at once begin the work of raising that vessel and the arms on board her, as provided in the first contract. (Rec., 164.)

About the last of August, 1898, the work of raising the *Colon* was stopped, in spite of the protest of Naval Constructor Hobson. (Appx., 599.)

In the brief for the United States in *United States* v. *Dewey* (pp. 27–48) it is shown that both bounty and prize money were granted as rewards for the injury inflicted upon the enemy's fighting force, and that section 4635, Revised Statutes, was intended to apply in any case where an enemy's vessel of war had been rendered incapable of serving as a part of the enemy's fighting force, and was no longer afloat, and that the status of an enemy's vessel of war as a prize or as "sunk or otherwise destroyed" must be determined by its condition at the close of the engagement or immediately afterwards. The details of the argument leading to that conclusion need not be repeated here, but the argument is precisely as applicable in the present case as in that of Dewey. At the close of the

battle the status of the *Teresa* was precisely the same as that of the *Colon* and the other wrecks. She lay in shallow water, approximately at her normal load water line, but with a good-sized hole in her bottom, and full of water. She was held fast by a rock which projected through her bottom. Above her protective deck she was so thoroughly ruined by fire as to need complete reconstruction, except probably as regards her turrets. The cost of patching the hole in her bottom, pumping her out and floating her, making temporary repairs, taking her to an American port for permanent reconstruction, and reconstructing her so as to make her once more a fighting vessel, has been variously estimated, but even the appellee's principal witness, Naval Constructor Hobson, estimated this at $1,100,000, or a little over two-fifths of her value when reconstructed and refitted, which he estimated at $2,700,000.[a] (Rec., 157.) Other witnesses put the necessary cost much higher. It would probably have taken at least a year to a year and a half to do this work. Now, a vessel of war which can not be floated and made a part of a fighting force for less than two-fifths (and perhaps considerably more than two-fifths) of her total money value, or within a year to a year and a half, may certainly be said to be "sunk or otherwise destroyed" in a very real sense. Even if the Cuban coast had remained in the possession of Spain, so that the United States could not have raised the *Teresa*, she

[a] There is a typographic error on the second line of page 157 of the record. The figures $2,300,000 should read $2,700,000.

would have been just as useless to Spain, for the purposes of the war, as if she had been annihilated. The service for which bounty is awarded, viz, the injury inflicted upon the enemy's fighting force, was therefore fully performed.

At the close of the battle the status of the *Teresa*, as has been said already, was the same as that of the other Spanish wrecks. Whatever occurred to differentiate the *Teresa* from the others must have occurred later. The act of the Navy Department in putting the Merritt & Chapman Company's force upon her and attempting to raise her could not have changed her status, because it has been judicially determined that the *Colon* was not a prize for the benefit of captors, but was "sunk or otherwise destroyed," in spite of the fact that the Government made two contracts for the raising of the *Colon*, and spent a large sum in the attempt to have her raised. This shows that to make a contract to raise a captured enemy's vessel of war, or even to set a contractor at work to raise her, is not an appropriation of the vessel to the use of the Government, within the meaning of section 4624, Revised Statutes. It is evident that during more than two months and a half, until September 23, 1898, when the *Teresa* was finally floated, her legal status was precisely the same as that of the other Spanish wrecks, for if, before that date, the work of raising her had been finally abandoned, as the work of raising the *Colon* had been, she would manifestly have remained "sunk or otherwise destroyed," and no pro-

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ceedings in prize could have been begun. On September 23, 1898, therefore, the *Teresa* became a prize of war, if she ever became such at all, and then, and not before, she was appropriated to the use of the United States. As in the case of the three vessels raised at Manila, if the *Teresa* became a prize, she became so not by naval capture alone, but by naval capture plus the act of a private corporation, which act was not complete until six weeks after hostilities had ceased, and after Spain had agreed to "relinquish all claim of sovereignty over and title to Cuba," including, of course, the spot where the *Teresa* lay. To treat the *Teresa* as a prize is therefore to violate the doctrine of *The Siren* (13 Wall., 389), and also to hold that a captured vessel can become a prize in time of peace, when she had not been a prize during the period of hostilities.

As regards the fact that the *Teresa* could never have been raised, and therefore, as even appellee's counsel will admit, could never have been subject to adjudication as prize, by any act of the captors alone, the case is perhaps even stronger than that of the three vessels raised at Manila. Those were vessels of only 1,030 and 1,130 tons displacement, and their bottoms were intact. It might possibly be contended that the contract with the Hongkong and Whampoa Dock Company was not absolutely necessary as regards the raising, though as that company did, as a matter of fact, do the raising, such a contention would hardly be relevant. In the present case, however, no such contention is possible.

The *Teresa* was a very large vessel, with a fair-sized pinnacle of rock sticking up through a hole in her bottom, and the captors could not possibly have raised her. This is admitted even by the appellee's witnesses. (Rec., 124, 135–136, 157.) Had it not been that there are persons who make a business of doing such work, the vessel would certainly have remained where she lay until she had been knocked to pieces by storms. Whether the wrecking company was needlessly slow in doing the work, or even bungled at it at first, as Mr. Hobson intimates (Rec., 151), is immaterial. What is material is that the work could not have been done without the wrecking company's plant. The fundamental doctrine of the *Siren*, viz, that nothing can be prize which does not become so by the unaided act of a naval force, is therefore utterly at variance with the contention that the *Teresa* was taken as a prize for the benefit of captors.

The brief of counsel for certain captors (p. 11) shows a complete misapprehension of the above argument when it refers to it as "a theory that the *Maria Teresa* was not captured until she was hauled off the beach." The brief for the appellee (pp. 13 to 22) shows a similar misapprehension. The counsel for the Government have never for a moment denied that the *Teresa* was captured at the close of the battle, precisely as the *Colon* was captured (where there was a formal hauling down of the Spanish flag in token of surrender) and precisely as the *Vizcaya* and the *Oquendo* were captured. They all "came within the power and control of the United States" on the 3d of July, and the three last

mentioned remained within that power and control until the United States withdrew from Cuba, and are the property of the United States to this day unless it has recently done anything which could be construed as an act of abandonment.

The argument on the part of the United States as to this point is this:

First. Nothing but capture by a naval force alone, under circumstances which bring the case within the prize statutes, can make a vessel a prize, so that on the question of whether the *Teresa* was a prize the fact of an appropriation by the United States is immaterial.

Second. The *Teresa* was not appropriated, by any species of appropriation applicable to the case of prize property, until September 23, 1898, when she was floated, because the mere attempt to float, even if long continued, as in the case of the *Colon*, is not an appropriation of prize property, the *Colon* having been judicially determined not to have been a prize, though unquestionably captured.

Third. Even if it could be contended that capture plus appropriation can make a vessel prize, when it would not have been a prize had there been no appropriation, they could not do so in this case, because the appropriation, having been made after hostilities ceased and Spain had abandoned all control over the spot where the *Teresa* lay, was not a hostile act, and hence could have no effect in making the vessel prize.

Fourth. Had the *Teresa* not been raised she never could have been claimed to have been a prize, so that,

if a prize, she has not become so by capture alone, but by capture plus raising. But, in the first place, a prize must become so by capture alone, and, in the second place, the raising was not done by those who claim as captors, and nothing but the unaided act of the captors can make a vessel prize.

It will probably be contended that the effect of the raising of the vessel should relate back to the date of its capture; that the captors, having made the capture, were entitled to take their time as to the raising; but this does not overcome the objection that the raising, the act which was essential to the vessel being subject to adjudication as a prize, was not the unaided act of the Navy, but that of an outside party, with some aid from the Navy. Moreover, if the effect of the raising is to relate back, that of the final loss of the vessel should relate back also. It is perfectly evident that the vessel had to be abandoned, and was finally lost, in consequence of the injuries which she suffered during the battle, or, in other words, that the raising was not permanently successful. If it is fair to disregard the period during which the *Teresa* was "sunk or otherwise destroyed," and to treat her as if she had been held as a prize from the first, it is equally fair to disregard the period during which she was again afloat, and to treat her as if she had remained "sunk or otherwise destroyed" from the first, her ultimate destruction being unquestionably due to what took place during the battle.

To argue that the *Teresa* was "sunk or otherwise destroyed" at the battle off Santiago *because* she was

abandoned and wrecked four months later on account of injuries received during the battle, would be clearly absurd. No degree of professional zeal could excuse such an argument; but, it is submitted, it is no more absurd than it would be to argue that she was captured as a prize at that battle *because* nearly three months later a private corporation, acting under a contract with the Government, succeeded in floating her. And yet the latter argument is really the foundation of the appellee's whole case. The contractors were put to work on the *Colon* and the *Teresa*. The *Colon* was not floated, and therefore she remained what she had been from the first, "sunk or otherwise destroyed." The *Teresa* was floated, and therefore she must have been *from the first* a prize, and in no sense "sunk or otherwise destroyed." That is the argument for the appellee.

It is not contended on the part of the United States that either the appropriation of the *Teresa* by the United States when the wreck was finally raised and sent to Guantanamo for preliminary repairs, or the subsequent abandonment of the vessel at sea and her final destruction on Cat Island, have divested the appellee of any right whatever. Had the *Teresa* been a prize, the appellee's rights as captor would not have been changed by the appropriation, and after appropriation it would have made no difference to the appellee whether the vessel was lost or not, as he was not responsible for what became of her. The position of the United States is simply this, that the *Teresa*,

lying in the water with a rock projecting into her, incapable of being floated by any means which the appellee's naval force possessed, and incapable of serving as a vessel of war until after very considerable reconstruction and repair, at a large expenditure of time and money, was "sunk or otherwise destroyed" within the meaning of section 4635 of the Revised Statutes, and was officially recognized as being in that condition. Furthermore, being so "sunk or otherwise destroyed," she could not be a prize for the benefit of the captors, but was the property of the United States, *jure reipublicæ*, just as much so as if she had been captured by a joint naval and military force. (*The Siren*, 13 Wall., 389.) The appropriation was by the right of the United States as sovereign, and not under section 4624 of the Revised Statutes. The appellee is entitled to bounty for the destruction of the *Teresa*, but to nothing more.

2.

THE STATUS OF PROPERTY TAKEN FROM VESSELS "SUNK OR OTHERWISE DESTROYED."

As to the property taken from the *Teresa* and the other wrecks, the reasons why such property can not be prize are fully set out in the brief in *United States* v. *Dewey* (pp. 85–106), and but little need be added in applying the legal doctrines there discussed to the present case.

It has been noted above that apparently no prize rights were ever claimed in the *Infanta Maria Teresa* until the petition in the suit for bounty was drawn up,

more than a full year after the battle; and the case is similar as regards the property taken from the wrecks. Had any prize rights in this property been asserted, an appraisal would have been necessary, under section 4624, at the time of appropriation; but no such appraisal was made in any instance, nor does the record disclose any such assertion of prize rights earlier than the date of the affidavit to the libel, July 16, 1899. Three days before this an appraisal was ordered, but this was long after the appropriation of the property, and it was not the work of the captors, but of the Navy Department. As far, therefore, as the understanding of the parties concerned has any bearing on the case, it is that for more than a year after the battle these parties had always believed that the words "ship or vessel of war belonging to an enemy," in section 4635, were not restricted to the mere shell of the vessel, but were intended to include the armament, outfit, and other appurtenances.

The fact that no appraisal was demanded nor any prize rights in this property asserted at the time of its appropriation is the more significant in view of the fact that the appellee remained in command of the North Atlantic Station during the whole time that this property was being appropriated, and that one of his immediate subordinates, Commodore Watson, had charge of the work carried on by the wrecking company in removing this property from the several wrecks until September 19, 1898, by which time all of it had apparently been removed and appropriated.

Several of his reports relate to such removal and appropriation. (Appx., 597–600.) It can not be contended for a moment that the appellee and those in whose behalf he filed the libel in this case were ignorant of all that was going on; and even if some of them were personally ignorant of it, they would be bound by the acts of the "senior officer present" (who is legally in charge of all prize property, in the interest of the captors), just as stockholders in a corporation are bound by the acts of their officers.

In this connection it may be noted that not a single precedent has been brought forward in support of the contention that property is prize when taken from an enemy's vessel of war for the destruction of which bounty has been paid, although the bounty law had been in force for ninety-eight years, and it is most unlikely that no property ever came into the hands of the United States under such circumstances before. All authority and precedent support the view that the appropriation of the guns and other property was made *jure reipublicae.*

It is therefore submitted that the decree should be reversed both as to the *Infanta Maria Teresa* and as to all the other property.

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